No. 96-1581

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, IDAHO, MISSOURI, NEVADA, UTAH AND WYOMING IN SUPPORT OF STATE OF SOUTH DAKOTA, ET AL.

DANIEL E. LUNGREN
Attorney General of the State of California
*THOMAS F. GEDE
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-7355
Counsel for Amici Curiae
(Additional counsel on inside cover)
**Counsel of Record*

ALAN G. LANCE
Attorney General of the State of Idaho
STEVEN W. STRACK
Assistant Attorney General
P.O. Box 83720
Boise, ID 83720
Telephone: (208) 334-4143

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

ALAN G. LANCE
Attorney General
State of Idaho

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

JAN GRAHAM
Attorney General
State of Utah

WILLIAM U. HILL
Attorney General
State of Wyoming

TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I THE OPERATIVE LANGUAGE OF THE CESSION ACT DISESTABLISHED THE RESERVATION AND REMOVED THE OPENED LANDS FROM INDIAN COUNTRY..... 4

A. The Operative Language of Cession and Sale Governs the Question of Disestablishment of the Reservation 5

B. The Savings Clause Does Not Operate to Negate the Cession and the Tribal Relinquishment of All Claim, Right, Title and Interest in the Ceded Lands..... 8

C. Other Provisions of the Agreement and Act Point to Disestablishment 10

D. The Historical Context Also Points to Disestablishment of Reservation Lands 11

II THE HISTORY OF CONGRESSIONAL ACTIONS WITH REGARD TO INDIAN LANDS AND THIS COURT'S PRECEDENTS DEMONSTRATE THAT AN IMPLICATION OF DISESTABLISHMENT ARISES WHEN CONGRESS, IN A SURPLUS LANDS ACT, DETERMINES TO TRANSFER LANDS FROM INDIAN OWNERSHIP..... 13

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Bates v. Clark,
95 U.S. 204 (1877) 20

Brendole v. Confederated Tribes and Bands of the Yakima Indian Nation,
492 U.S. 408 (1989) 18

Clairmont v. United States,
225 U.S. 551 (1912) 20

DeCoteau v. District County Court,
420 U.S. 425 (1975) 4, 5, 6, 7, 12

Dick v. United States,
208 U.S. 340 (1908) 10

Ex parte Kan-gi-shun-ca (Ex parte Crow Dog),
109 U.S. 556 (1883) 19

Hagen v. Utah,
510 U.S. 399 (1994) 2, 4, 6, 7, 11

Mattz v. Arnett,
412 U.S. 481 (1973) 7

Montana v. United States,
450 U.S. 544 (1981) 2, 18

Oregon Fish & Wildlife Dept. v. Klamoth Tribe,
473 U.S. 753 (1985) 6

Pittsburgh & Midway Coal Mining Co. v. Yazzie,
909 F.2d 1387 (10th Cir. 1990) 17

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) 4, 10, 11

TABLE OF AUTHORITIES – Continued

Page

Seymour v. Superintendent,
368 U.S. 351 (1962) 7, 16

Solem v. Bartlett,
465 U.S. 463 (1984) ..... *passim*

South Dakota v. Bourland,
508 U.S. 679 (1993) 14, 18

Spalding v. Chandler,
160 U.S. 394 (1896) 13

Strate v. A-1 Contractors,
117 S.Ct. 1404 (1997) 2

United States v. Shoshone Tribe,
304 U.S. 111 (1938) 13, 14

CONSTITUTIONAL PROVISIONS

United States Constitution 1

FEDERAL STATUTES

Revised

§ 2139 (1878) 19

§ 2145 (1878) 19

§ 2152 (1878) 19

Title 18

§ 1151(a) 16

CONGRESSIONAL MATERIALS

17 Cong. Rec. 1630 (1886) 15

18 Cong. Rec. 190 (1886) 15

TABLE OF AUTHORITIES – Continued

Page

18 Cong. Rec. 191 (1886) 15

26 Cong. Rec. 8257 (1894) 12

OTHER AUTHORITIES

Treaty of April 19, 1858, 11 Stat. 743 .....7, 8, 9, 10

Yankton Sioux Agreement of 1892 8

art. I 7, 9

art. II 9

art. XVIII 8, 9

Act of February 8, 1887, ch. 119, sec. 5, 24 Stat. 388 15

Act of June 30, 1834, ch. 161, 4 Stat. 729 19

Act of August 15, 1894 5

art. I 3, 6, 7

art. II 6, 7

art. VIII 17

art. XVII 11

General Allotment Act 14, 15, 18

Public Land Law Review Commission, *Study of Withdrawals and Reservations of Public Domain Lands* 1 (1969) 17

S. Exec. Doc. 27, 53rd Cong., 2d Sess. at 17-19 (Mar. 31, 1893, Report of the Yankton Indian Commission) 9

TABLE OF AUTHORITIES – Continued

Page

Statement of Mr. Herman, J.A. 3785 .....12, 17

Statements of Mr. Wilson of Washington, Mr. Pickler of South Dakota, J.A. 422; 26 Cong. Rec. 8257 (1894) 12

Trial testimony of Herbert Hoover, Trial Tr. at 53-54 9

INTEREST OF AMICI

Amici States face the real possibility that, a century after the fact, lands assumed to have been removed from Indian country status by various nineteenth century congressional acts will "revive" as Indian reservation lands, divesting States and local governments of considerable civil and criminal jurisdiction. This case represents an opportunity for this Court to settle its diminishment jurisprudence in such a manner as to reduce litigation which arises repeatedly, in which Tribes and the United States attempt to distinguish away this Court's precedent.

The United States Constitution charges the federal government with the management of Indian affairs. The federal government has often struggled with this responsibility. At first it attempted to segregate Tribes by placing them on reservations that non-Indians could not enter without government permission. It then attempted to integrate Tribes into society by abolishing reservations and tribal governments and selling former reservation lands to non-Indians. When this policy did not produce the desired results, Congress revitalized tribal governments and restored lands to tribes. The result of these various federal policies has been a jumbling of Indian and non-Indian lands, and a blurring of the laws and legal standards defining jurisdiction on such lands. Non-Indians residing on former tribal lands often find themselves subject to tribal claims of regulatory and taxing authority. Such claims by a government in which they cannot participate often breeds frustration, as they face burdens and disadvantages not imposed on others.

At the same time, tribal governments cannot provide non-Indians the full range of services and protections to be expected from a government and which state governments routinely provide. For example, they cannot enforce criminal laws against non-Indians. As for civil regulations, this Court has stated as a general rule that tribes lack such jurisdiction, but has found several exceptions. *Montana v. United States*, 450 U.S. 544, 564-67 (1981); *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1414-16 (1997). As one can imagine, tribes eager to assert their sovereignty argue that almost every conceivable regulation fits within the exceptions. The result is a jurisdictional morass that places great burdens upon the states. Obligated to enforce the law on non-Indian lands and provide governmental services to non-Indians, states are faced at every turn with the argument that the tribe has jurisdiction and therefore state jurisdiction is preempted.

This question presented in this case may help to clarify jurisdiction on many former tribal lands now owned in fee by non-Indians. The states submit that when authorizing the sale of such lands to non-Indians, Congress intended the non-Indian residents to be subject to state jurisdiction, unless express and specific provisions were made to the contrary.

SUMMARY OF ARGUMENT

Following this Court's precedent and traditional analysis, as reaffirmed in *Hagen v. Utah*, 510 U.S. 399 (1994), there is little doubt but that Congress diminished the reservation in this case, eliminated the original

boundaries of the reservation, and restored state civil and criminal jurisdiction on the opened and ceded lands. The express cession language of the act opening the Yankton Sioux Reservation evidenced the kind of "present and total surrender of tribal interests," that "strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). The critical language is in the operative language of the agreement in which the Yankton Sioux Indians "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands . . . " Act of August 15, 1894, art. I. The Eighth Circuit failed to address the "almost irrebutable presumption" of disestablishment or diminishment that arises when such cession language is coupled with the payment of a sum certain, as occurred in this case.

Instead, the Eighth Circuit majority relied upon a savings clause that recited that the earlier 1858 Treaty establishing the reservation remain in effect. It overlooked that the thrust of the savings clause, which is not in the operative language of the agreement, appears directed at the continuation of the payment of annuities by the federal government. Further, the 1858 Treaty only protected the interests of the Indians on the lands they possessed, and given the operative language which divested the Indians of the possession of the unallotted surplus lands, certainly the savings clause cannot serve to retain an Indian reservation on those lands.

Additionally, entirely aside from the question of disestablishment, the extinguishment of a tribe's title to reservation lands, as occurred here, necessarily implies

that Congress intended to transfer governmental authority over those lands to the state, unless there is express language preserving federal or tribal authority over the transferred lands. Except for a limited federal reservation of a portion of the ceded and opened lands, no such preservation of federal or tribal authority appears in the agreement or act, and, in fact, any such preservation that would suggest a continuing Indian reservation would be inconsistent with the operative language of the act.

Further, it should make no difference whether a tribe receives a "sum certain" for the sale of the lands, *see, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 448 (1975), or whether it receives the proceeds of the sale of the lands to non-Indians. *See, generally, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). A more compelling question is whether Congress intended non-Indians settling upon opened lands to be subject to tribal jurisdiction. Clearly, it could not when it ratified an agreement in which the Tribe relinquished "all claim, right, title and interest" in the ceded lands.

ARGUMENT

I

THE OPERATIVE LANGUAGE OF THE CESSION ACT DISESTABLISHED THE RESERVATION AND REMOVED THE OPENED LANDS FROM INDIAN COUNTRY

In *Hagen v. Utah*, 510 U.S. 399 (1994), this Court reaffirmed its traditional approach to diminishment cases, starting with an examination of the statutory language used to open the Indian lands. *Id.*, at 411-412. The

Court also will examine the historical context surrounding the passage of the surplus land act and the subsequent settlement by non-Indians on the opened lands. *Ibid.*; also *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975). Using the traditional approach, amici States submit there is little doubt but that Congress diminished the reservation in this case, eliminated the original boundaries of the reservation, and restored state civil and criminal jurisdiction on the opened and ceded lands. The well-reasoned dissent of Circuit Judge Magill in this case provides reasons enough, as he thoroughly outlines the errors of the majority opinion and points to a conclusion more consistent with this Court's precedent. Amici States fear that were this Court to adopt the conclusion reached by the Eighth Circuit majority, it would strongly suggest to other courts that they may easily disregard the intent of Congress expressed in the operative language of similar acts, and in doing so, restore vast amounts of land, especially in the Western States, to the status of "Indian country." This would unsettle long-held understandings that state civil and criminal jurisdiction applies on the open and ceded lands, lead to difficult and protracted litigation and deprive non-Indians on the privately-held lands of certainty in their day-to-day affairs.

A. The Operative Language of Cession and Sale Governs the Question of Disestablishment of the Reservation.

The express cession language of the August 15, 1894 Act opening the Yankton Sioux Reservation evidences a "present and total surrender of tribal interests," *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), wherein it recites that

the Yankton Sioux Indians: "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands . . . " Act of August 15, 1894, art. I. This Court has held that such an explicit reference to cession and surrender of tribal interests "strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, at 471. Apart from the payment of a sum certain to the Tribe in Article II, which further buttresses the cession language in Article I, it is difficult to see how the tribal "relinquishment" of "all claim, right, title and interest" in the unallotted lands can conceivably preserve reservation status in those unallotted lands. With the payment of the sum certain, this Court informs us that a nearly conclusive presumption arises that the reservation has been diminished. *Solem*, at 471; *Hagen*, at 411. Yet, the Eighth Circuit barely acknowledges this Court's instruction and does not follow it.

DeCoteau also informs us that the "relinquishment" of "all claim, right, title and interest" to all the ceded lands is not merely to *proprietary* interests, leaving tribal *governmental* interests somehow to survive as to those lands. First of all, the tribe and the government used the word "all" in describing the interests relinquished – certainly they cannot have meant to preserve significant tribal governmental authority, such as civil and criminal authority, on those lands. Those are major interests and rights associated with the land. *See, Oregon Fish & Wildlife Dept. v. Klamath Tribe*, 473 U.S. 753, 768, 772-773 (1985) (no right to fish preserved on ceded lands where Tribe ceded "all their claim, right, title, and interest in and to" those lands). In *DeCoteau*, the Court made it clear that the tribe and the government were satisfied that the retention of

allotments would provide an *adequate fulcrum for tribal affairs. DeCoteau v. District County Court*, 420 U.S. at 446. Here, too, nothing suggests that the relinquishment of all interests in the ceded lands was limited to a possessory or title claim, leaving a "reservation" for the Tribe to govern. Indeed, by the terms of the 1858 treaty, the Tribe's reservation was to consist of lands that it "owned, possessed, or claimed." Treaty with the Yankton Sioux, art. 1, 11 Stat. 743. If the Tribe relinquished its possessory claims, it had to have understood that it was losing its reservation. It should be noted that in those cases in which the Court has found no diminishment or termination following an act which opened the reservation for settlement, the Court noted there was no tribal cession and relinquishment of interests, as here. *See Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962). Amicus Charles Mix County thoroughly discusses those two cases as to their relevancy and meaning.

Critical to the analysis is that these cession and payment provisions are the fundamental *operative* language of the agreement and act. In contrast, for example, this Court held that the act in *Solem* only authorized the Secretary of Interior to sell and dispose of unallotted reservation lands, and the language which referred to restoring such lands to the public domain were not in the *operative* language of that act. *See Hagen v. Utah*, at 413. Accordingly, this Court held that the act in *Solem* did not diminish the reservation there. *Solem*, at 472-474. Apart from whether *Solem* would be decided the same way today, it is clear that this case provides a sharp contrast to *Solem* where Articles I and II in the 1984 Act provide language which is "precisely suited to disestablishment" purposes. *Solem* at 473, n. 15.

B. The Savings Clause Does Not Operate to Negate the Cession and the Tribal Relinquishment of All Claim, Right, Title and Interest in the Ceded Lands

The Eighth Circuit majority rests its decision on the savings clause found in Article XVIII, which recites that the earlier 1858 Treaty establishing the reservation remain in full force and effect and that the "Yankton Indians shall continue to receive their annuities . . . " As the South Dakota Supreme Court and Eight Circuit Judge Magill have opined, the savings clause can only reasonably go to the continued payment of annuities. It also follows that the government's obligations in the 1858 Treaty to protect the Indians would continue *as to the lands remaining* after the cession and sale. To suggest anything more negates not only the "cession" and "sale" of the unallotted lands, but also the "relinquishment" by the Tribe of "*all* claim, right, title and interest" in those lands. (Emphasis added.) Given the *total* "relinquishment" of all Tribal interests in the unallotted lands, how can the savings clause, which is *not* part of the operative language of the Agreement, preserve reservation status? A reservation is meant to set aside lands, lands "reserved" from sale, in which the Tribe has a continuing right of occupancy, an interest in the land's use and beneficial, if not actual, title. In fact, as the Circuit majority states in this case, the 1858 Treaty acknowledged the authority of the Tribe over the reservation. However, in the 1892 Agreement, the Yankton Sioux disclaimed and relinquished *all interests* in those specific lands ceded and sold to the United States. No reading of the savings clause in Article XVIII can undo the operative

disclaimer by the Tribe of all claims, rights, title and interest in those lands.

The Circuit majority baldly concludes Article XVIII can be read together with Articles I and II to allow for the continuation of the reservation. Amici States submit the provisions can be read together, but only as to the allotted lands held in Indian title, and as to the continued payment of annuities. The historical circumstances confirm that at the time the savings provision was agreed to, the Yankton Sioux were most concerned about a potential governmental cut-off of annuities. *See, e.g.*, S. Exec. Doc. 27, 53rd Cong., 2d Sess. at 17-19 (Mar. 31, 1893, Report of the Yankton Indian Commission); Trial testimony of Herbert Hoover, Trial Tr. at 53-54.

Additionally, the savings clause must be read in the context of those provisions of the 1858 Treaty that define the Tribe's interests. Indeed, the savings clause can be read to provide for continuing jurisdiction over lands conveyed in fee to non-Indians only if the 1858 treaty *originally* provided for tribal jurisdiction over such lands. In 1858, the federal government promised to protect the Tribe in "the quiet and peaceable possession" of its reserved lands. Treaty with the Yankton Sioux, art. 4, 11 Stat. 743, 744. By the terms of the 1858 treaty, the Tribe's reservation was to consist of lands that they "owned, possessed, or claimed." *Id.*, art. 1, 11 Stat. at 473. This description of the lands reserved for the Tribe also describes the limits of the Tribe's jurisdiction, which, by the terms of the Treaty, applied only to lands within its possession. By opening lands to non-Indian ownership and possession, Congress necessarily removed the lands

from the Tribe's possession. Article I of the 1892 Agreement relinquished the Tribe's claim, right, title and interest in the ceded lands. Clearly, the Tribe could not have possession. The savings clause, then, cannot be read to erase the effects of the sale. Instead, should be properly read as retaining all treaty rights on lands having the same character as the lands reserved in the 1858 treaty, i.e., lands that remained in the ownership and possession of the Tribe or individual Indian allottees.

C. Other Provisions of the Agreement and Act Point to Disestablishment.

Historically, Congress was aware that by opening reservation lands and conveying them to non-Indians, it was necessarily removing such lands from the operation of tribal and federal laws applicable to Indian country. As a general rule, where special federal concerns were present, Congress expressly retained jurisdiction. Importantly, such jurisdiction was typically limited and restricted to the minimum jurisdiction necessary to address the specific concern. For example, many surplus land acts provided for continuing federal jurisdiction over the distribution of liquor to Indians. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 613. The type of language required to retain continuing federal jurisdiction over ceded lands has been previously addressed by this Court. In *Dick v. United States*, 208 U.S. 340 (1908), the Court reviewed a surplus land act extinguishing Indian title to the Nez Perce Reservation, but providing that the ceded lands would be "subject for a period of twenty-five years to all the laws of the United States prohibiting the

introduction of intoxicants into the Indian country. . . ." Id. at 345.

Here, the Act provides in Article XVII a prohibition on the sale of liquor on the ceded lands. As Judge Magill reasonably concluded: "The inclusion of a liquor prohibition provision in an allottment statute is indicative of an intent to diminish the reservation, because standing law had already prohibited the introduction of alcohol into Indian country," citing *Rosebud*, 430 U.S. at 613-615. While the Circuit majority found no evidence that the negotiators were aware of the 1892 liquor prohibition act, that does not compel the conclusion the majority reached. It does not logically follow that the inclusion of the liquor prohibition was negotiated on the assumption that the ceded and sold surplus lands were to be considered reservation lands. Judge Magill's analysis rings truer.

D. The Historical Context Also Points to Disestablishment of Reservation Lands

As instructed by *Hagen*, amici States also point to the historical context surrounding the passage of the surplus land act and the subsequent settlement by non-Indians on the opened lands. Amici States support the reading given the legislative history as set forth by South Dakota, the amici counties and waste management district. This history points to an understanding by the Congress, *at the time of the passage of the Act*, that it fully intended by adopting the cession and sum certain language a disestablishment of the reservation and that the original boundaries of the reservation would not remain intact.

The negotiations reveal the Tribe understood, in the bargaining for the best possible price for the sale of the surplus lands, that it was similar to the cession of the surplus lands of the Sisseton and Wahpeton Tribe, whose reservation was held to be disestablished by the same means in *DeCoteau v. District County Court*, 420 U.S. at 445. The Secretary of Interior reported on January 16, 1894, to the United States Senate, then considering ratification, on the Yankton Sioux negotiations and included the report of the Commissioner of Indian Affairs, which itself demonstrated the similarities to the cession agreement at issue in *DeCoteau*. The congressional debate itself points to an understanding that neither the Tribe nor the United States expected that the reservation was to remain intact: the debate on Yankton included regular references to uniform and similar policies of procuring "lands from the Indians" and "closing up our reservations." *See* Statements of Mr. Wilson of Washington, Mr. Pickler of South Dakota, J.A. 422, 427; 26 Cong. Rec. 8257 (1894); *also see* Statement of Mr. Herman ("They are lands belonging to the Indian reservation and to certain bands of Indians. They do not become lands of the United States at all until after the ratification of the treaty made with the Indians. Then and only then do they become subject to our land laws.") J.A. 3785.

II

THE HISTORY OF CONGRESSIONAL ACTIONS WITH REGARD TO INDIAN LANDS AND THIS COURT'S PRECEDENTS DEMONSTRATE THAT AN IMPLICATION OF DISESTABLISHMENT ARISES WHEN CONGRESS, IN A SURPLUS LANDS ACT, DETERMINES TO TRANSFER LANDS FROM INDIAN OWNERSHIP.

In this section, amici States offer the Court an historical perspective relating to the cession acts and disestablishment of Indian reservations. While these views may not be determinative of this case, they may inform the Court as to key elements of the relevant history.

With a few notable exceptions, such as navigable waterways and mission stations, all lands within the original boundaries of Indian reservations were owned in fee by the United States, with the occupant tribe holding a temporary or perpetual right of use and occupation, a property right commonly referred to as "Indian title." *United States v. Shoshone Tribe*, 304 U.S. 111, 116-17 (1938) (tribe possessed "[t]he right of perpetual and exclusive occupancy" to reserved lands); *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) (within reservation tribe retained "right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit. . . . "). This basic fact shaped the initial rules establishing the respective boundaries of federal, tribal and state jurisdiction within Indian reservations. Tribal jurisdiction was

equated with tribal ownership of lands. Tribal authority over non-Indians was founded on the principle that the occupant tribe, as owner of the lands, had the power to exclude non-members, and this power to exclude necessarily included a lesser power to regulate the conduct of non-members. *South Dakota v. Bourland*, 508 U.S. 679, 688-91 (1993). The power to exclude non-members was often expressly embodied in the terms of a treaty, *see Bourland*, 508 U.S. at 687-88, but was understood also to be inherent in the nature of Indian title. *See United States v. Shoshone Tribe*, 304 U.S. at 116-17 (noting tribe's inherent right to "exclusive occupancy" of reserved lands).

Tribal ownership of all lands within reservation boundaries provided a "bright-line" rule: inside the boundaries of the reservation, jurisdiction over most affairs rested in the tribe or the federal government. Outside the reservation, jurisdiction rested in the state or territorial government. Thus, in nineteenth century America, large sections of the western United States remained under tribal control.

The inexorable pressure of white settlement, however, caused the Government to whittle away at the reservations, so that the bounds of tribal ownership grew smaller and smaller. Eventually, pressure to reduce tribal landholdings, along with a desire to integrate Indians into the dominant society, led Congress to adopt the General Allotment Act. The Act provided for the allotment of tribal lands to tribal members in severalty, and further provided that once allotment was completed, the Secretary of Interior could negotiate with the tribe "for

the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell . . . " Act of February 8, 1887, ch. 119, sec. 5, 24 Stat. 388, 389.

Senator Henry L. Dawes, the principal author of the legislation, explained that its provisions were intended to authorize the Secretary of Interior, by negotiation or otherwise, "to reduce the limits and open up to the public all those parts of those reservations not necessary for the purpose of maintaining upon the reservation such of these Indians as in his opinion he cannot wisely put out upon the land." 17 Cong. Rec. 1630 (1886). Senator Dawes and others also emphasized that the purpose of the Act was to break up tribal organizations and "individualize" Indians. 17 Cong. Rec. 1630 (1886) (remarks of Sen. Dawes); 18 Cong. Rec. 191 (1886) (remarks of Rep. Perkins).

One of the purposes of the General Allotment Act was to provide a road map for Indian policy, as opposed to the prior method of separate negotiations with each tribe, which had led to a hodgepodge of treaties and statutes with unique and not always consistent provisions. One Congressman noted the "pressing necessity for the adoption of a general Indian policy." 18 Cong. Rec. 190 (1886) (remarks of Rep. Skinner). The provisions of the General Allotment Act defined Indian policy for the next several decades. One result was what this Court has termed "surplus land acts," in which portions of reservations remaining after allotment were opened to

non-Indian ownership, mostly through negotiation but often through unilateral action by Congress.

This Court has stated that "it is settled law that some surplus land Acts diminished reservations, and other surplus land Acts did not." *Solem v. Bartlett*, 465 U.S. 463, 469 (1984) (citations omitted). Thus, the Court's approach has been to examine each surplus land act independently for evidence that Congress intended to diminish the reservation. As this court has noted, the "question" of diminishment was not considered by Congress when enacting surplus land acts, because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century." *Solem*, 465 U.S. at 468.

Amici States suggest that the question of disestablishment should be approached from this historical perspective and that, in the ordinary case, the transfer of ownership of lands from Indians to non-Indians raised a strong implication that "Indian country" status was thereby lost. Certainly, it is true that in 1948 Congress changed the definition of Indian country to include all lands within the limits of a reservation, 18 U.S.C. 1151(a), but nothing suggests that Congress intended this definition to apply retroactively. If Congress believed it was extinguishing a reservation in 1894 or in 1900, it did so in fact. While *Seymour v. Superintendent*, 368 U.S. at 357-358, suggests the section 1151 definition settles the matter in that case, amici States respectfully submit that pre-1948 cessions operated to diminish or disestablish reservations when unallotted lands were ceded. Amici submit the

Tenth Circuit correctly states this proposition in *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1421-1422 (10th Cir. 1990).

From a proper historical perspective, amici States note that the sale of lands to non-Indians extinguished all federal title, so that the lands would cease to be a "reservation" in the normal sense of the word. The term "reservation" has been used to describe public lands that have been withdrawn from sale and set aside for specific purposes. Public Land Law Review Commission, *Study of Withdrawls and Reservations of Public Domain Lands* 1 (1969). Just as Congress understood the lands would not be subject to federal public lands laws until the Yankton agreement was ratified, *see* Statement of Mr. Herman, *supra*, so it understood that once the lands were sold to non-Indians, they ceased to be public lands and ceased to be dedicated to any particular federal purpose. Thus, it is highly unlikely that Congress, when opening lands to sale, would have understood those lands to remain reserved in any sense of the word – either for the Tribe or for federal purposes. In this case, the Government *did* "reserve[ ] from sale to settlers" a part of the the surplus lands "ceded and sold to the United States" for "agency, schools and other purposes." Act of August 15, 1894, Article VIII. Contrary to the Circuit majority's conclusion, such a federal reservation implies Congress understood that lands *not* reserved and otherwise sold off, could not remain in "reservation" status. The Circuit majority simply reads too much into the reservation in Article VIII – the Federal Government wished to retain some of the purchased lands for its own purposes, and not allow them for sale. Without such a reservation, the opened

lands would become available for sale under the homestead and public lands acts.

Additionally, as this Court recognized in *South Dakota v. Bourland*, 508 U.S. 679 (1993), conveyance of lands in fee simple to non-Indians extinguishes tribal rights to the use and occupation of the lands:

> [W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.

Id. at 689 (footnote omitted). The "type of area" referred to by the Court was an area of the reservation that had "been broadly opened to the public," as opposed to a "closed" or pristine area with a few non-Indian landholdings. *See id.* at 689 n. 9; *see generally Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (comparing "opened" and "closed" portions of reservation). By *broadly* opening lands to non-Indian ownership, Congress knew that such lands would no longer be available for the exclusive use of the tribe, a hallmark of reservation status.

Further, the surplus land acts were enacted to carry out the general policy established in the General Allotment Act. The Court has recognized that the allotment of Indian lands "was consistently equated with the dissolution of tribal affairs and jurisdiction." *Montana v. United States*, 450 U.S. 544, 559 n. 9 (1981) (citations omitted). In carrying out the allotment policy, it would make little

sense for Congress to submit non-Indians to tribal jurisdiction by preserving the "reservation" status of lands opened to non-Indian settlement. In fact, this Court has noted that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Id.* If Congress intended non-Indians purchasing allotments from tribal members would not be subject to tribal jurisdiction, it would follow that Congress also intended non-Indians purchasing lands opened for the express purpose of non-Indian settlement would be free from tribal jurisdiction.

Finally, and most importantly, at the time Congress was enacting the surplus land acts, it was an established principle that once a tribe surrendered title to certain lands, federal and tribal jurisdiction over those same lands ceased, unless expressly reserved. At the time, most jurisdictional questions involving Indian tribes revolved around whether the affected area was "Indian country." *See, e.g.*, Rev. Stat. § 2139 (1878) (prohibiting introduction of liquor into Indian country); Rev. Stat. § 2145 (1878) (extending federal criminal laws to Indian country); Rev. Stat. § 2152 (1878) (persons fleeing into Indian country to be arrested and extradited with permission of chiefs). In 1834, Congress had defined the Indian country as the area west of the Mississippi not within existing states and territories, and the area east of the Mississippi "to which Indian title had not been extinguished." Act of June 30, 1834, ch. 161, 4 Stat. 729. Upon adoption of the Revised Statutes, the definition was repealed, but it continued to provide guidance to the Court. *Ex parte Kan-gi-shun-ca (Ex parte Crow Dog)*, 109 U.S. 556, 560-61 (1883). By 1877, it

had been established that the term "Indian country" referred to the land described in the 1834 statute "so long as the Indians retain their original title to the soil," and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress. *Bates v. Clark*, 95 U.S. 204, 209 (1877).

In *Clairmont v. United States*, 225 U.S. 551 (1912), the Court stated:

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Id. at 558, *quoting Bates v. Clark*, 95 U.S. at 208.

Clairmont did not require any particular method of extinguishment in order to remove non-Indian lands from tribal jurisdiction. The only requirement was that the tribe "part with the title." *Clairmont*, 225 U.S. at 558. Amici thus conclude, consistent with this historical and legal background, that when Congress in a surplus land act determined to transfer land from Indians to non-Indian, a strong implication arose that Congress intended to disestablish the reservation.

We submit further that this implication is fully consistent with, and indeed may be read as part of, the "almost insurmountable presumption" of disestablishment which arises when a surplus land agreement uses

"cession and sum certain language" and that the implication discussed here provides a significant part of the analytical basis for that presumption.

We finally submit, that nothing in the record before this Court overcomes the implication created by the Congressional action in the Yankton Act.

CONCLUSION

This Court has the opportunity to settle its Indian reservation disestablishment and diminishment jurisprudence and send a clear message to other courts that they cannot so easily disregard the intent of Congress expressed in the turn-of-the-century surplus lands acts, much as the Eighth Circuit did here. Amici States face protracted litigation over 100-year old Acts of Congress and the potential for the "revival" of Indian country that has not been acknowledged to exist for a century.

While the operative language of the Yankton Sioux cession agreement and ratifying act raised an almost insurmountable presumption of disestablishment of the Yankton reservation, the Circuit majority did not address the presumption nor did it heed this Court's precedent. Further, the Court of Appeals' conclusion that Congress intended to retain tribal jurisdiction over lands opened to non-Indian settlement does not withstand scrutiny. It cannot be denied that Congress opened the lands at issue for the specific purpose of non-Indian settlement, an act totally at odds with continued tribal jurisdiction. Because the surplus lands act at issue did not expressly provide for tribal jurisdiction over the opened lands, the only

conclusion that is supported by the language of the act and the policies underlying it is that the opened lands were removed from the reservation and placed under the full and unrestricted jurisdiction of the State of South Dakota.

Respectfully submitted,

ALAN G. LANCE
Attorney General of the State of Idaho
STEVEN W. STRACK
Assistant Attorney General
P.O. Box 83720
Boise, ID 83720
Telephone: (208) 334-4143

DANIEL E. LUNGREN
Attorney General of the State of California
*THOMAS F. GEDE
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-7355
Counsel for Amici Curiae
**Counsel of Record*